STATE OF WISCONSIN

BEFORE THE WISCONSIN EMPLOYMENT RELATIONS COMMISSION

PLUMBERS & STEAMFITTERS, LOCAL 206, Complainant, vs. DON CVETAN PLUMBING, Respondent.	Case I No. 17433 Ce-1522 Decision No. 12356-A

Appearances:
Mr. Lonny Hanson, Business Representative, appearing on behalf of Complainant.
Dillman and Holbrook, Attorneys at Law, by Mr. William H. Holbrook, appearing on behalf of Respondent.

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

A complaint of unfair labor practices having been filed with the Wisconsin Employment Relations Commission, herein Commission, in the above-entitled matter; and the Commission having appointed Amedeo Greco, a member of its staff, to act as examiner and to make and issue Findings of Fact, Conclusions of Law and Orders as provided in Section 111.07(d) of the Wisconsin Employment Peace Act; and, pursuant to notice, a hearing on said complaint having been held at Sheboygan, Wisconsin, on January 24 and 25, 1974, before the Examiner; and the Examiner having considered the evidence, makes and issues the following Findings of Fact, Conclusions of Law and Order.

FINDINGS OF FACT

1. That Plumbers and Steamfitters Local 206, herein referred to as Complainant or Union, is a labor organization having its office at 50 East Bank Street, Fond du Lac, Wisconsin.

2. That Don Cvetan Plumbing, herein Respondent, is an employer whose office is at 2311 North 24th Street, Sheboygan, Wisconsin; that at all times material hereto, Respondent has been engaged in the construction industry; that during the past calendar year, Respondent's gross volume of business totaled approximately $171,000 and during the same period Respondent purchased goods from outside the state of Wisconsin in excess of $50,000; and that Respondent is engaged in interstate commerce and is therefore subject to the provisions of the National Labor Relations Act, as amended. 1/ (herein NLRA)

3. That on or about September 1, 1973, Respondent, by its president Donald Cvetan, Sr., and the Union executed a collective bargaining agreement, herein referred to as the Agreement, setting forth the wages, hours and conditions of employment of certain of Respondent's employes; that the Agreement in Article 3, Section 3.1, provides in

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1/ Siemons Mailing Service 122 NLRB 81.

pertinent part that employes shall have (14) fourteen calendar days in which to join the Union; and that Respondent then recognized the Union as the collective bargaining spokesman for its employes, even though the Union had not demonstrated its majority status prior to the execution of the Agreement.

4. That the Union filed the instant complaint on or about November 30, 1973, alleging that Respondent had refused to comply with the contractual provisions of the aforesaid Agreement by failing to require its employes to join the Union; and that such refusal constituted an unfair labor practice under Section 111.06(1)(f) of the Wisconsin Peace Act. 2/

5. That Respondent has failed to require its employes to join the Union pursuant to Article 3, Section 3.1, and that therefore it had breached the terms of the Agreement.

Based upon the above and foregoing Findings of Fact, the Examiner makes the following

CONCLUSIONS OF LAW

1. That Respondent is engaged in interstate commerce and therefore is subject to the proviso contained in Section 8(f) of the NLRA, which provides that unions and employers engaged in the construction industry can agree to pre-hire arrangements, without a representation election being held; that pursuant to Section 8(f), supra, Respondent and the Union on September 1, 1973 entered into a lawful contract under the NLRA and that said Agreement constitutes a valid contract within the meaning of the Wisconsin Employment Peace Act.

2. That by failing and refusing to abide by the terms of that Agreement, particularly Article 3, Section 3.1, Respondent has committed an unfair labor practice within the meaning of Section 111.06(1)(f) of the Wisconsin Peace Act.

Based upon the above and foregoing Findings of Fact and Conclusions of Law, the Examiner makes the following

ORDER

IT IS ORDERED that Respondent, Don Cvetan Plumbing, its officers and agents shall immediately:

(1) Cease and desist from:

Refusing to comply with the terms of the collective bargaining agreement Respondent signed with the Union on September 1, 1973, including the Union security provision contained in Article 3, Section 3.1 of the Agreement.

(2) Take the following affirmative action which the Examiner finds will effectuate the policies of the Wisconsin Employment Peace Act:

2/ The complaint was amended at the hearing.

(a) Immediately comply with all of the terms contained in the aforesaid collective bargaining agreement, including the contractual union security provision under which employes have fourteen (14) days in which to join the Union.

(b) Notify the Wisconsin Employment Relations Commission, in writing, within twenty (20) days from the date of this Order, as to what steps it has taken to comply herewith.

Dated at Madison, Wisconsin, this 12th day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Amedeo Greco, Examiner

MEMORANDUM ACCOMPANYING
FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The hearing herein established certain undisputed facts: (1) Respondent is primarily engaged in the construction industry and the Union represents employes in that industry; (2) anticipating 3/ a major contract, Respondent's president, Don Cvetan, Sr., executed a collective bargaining agreement with the Union on or about September 1, 1973; (3) under the terms of that Agreement, Respondent agreed that its employes would have fourteen (14) days in which to join the Union; (4) Respondent admittedly has refused to abide by the Union security provisions contained in Article 3, Section 3.1 of that Agreement; and (5) it appears that none of Respondent's employes ever joined the Union.

As justification for its admitted noncompliance with the Agreement, Respondent primarily argues that that Agreement is unenforceable because Respondent recognized the Union as the spokesman for its employes without there first being a representation election.

This contention is without merit. Thus, as noted in the above findings of fact, Respondent is engaged in interstate commerce and is therefore subject to the provisions of the NLRA, including Section 8(f) therein, which states, inter alia:

> "It shall not be an unfair labor practice under subsections (a) and (b) of this section for an employer engaged primarily in the building and construction industry to make an agreement covering employes engaged (or who, upon their employment, will be engaged) in the building and construction industry with a labor organization of which building and construction employes are members. . . because (1) the majority status of such labor organization has not been established under the provisions of Section 9 of this Act prior to the making of such agreement. . ."
>
> "Provided further, that any agreement which would be invalid, but for clause (1) of this subsection, shall not be a bar to a petition filed pursuant to Section 19(c) or 9(e)."

In construing this language, the Circuit Court of Appeals for Fifth Circuit has held in Operating Engineers, Local 150 v. NLRB (R.J. Smith Construction Co.), 83 LRRM 2706, that an employer committed an unfair labor practice when it refused to honor the terms of a pre-hire agreement. Reversing the National Labor Relations Board's contrary determination, 4/ the Court ruled that since an employer can file a representation petition at any time pursuant to Section 8, it, the Court, could:

> "find no sanction in the language, history, or policy of [section] 8(f) for permitting an employer to abrogate unilaterally a validly executed pre-hire agreement, or for permitting the employer to commit

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3/ It is immaterial that Respondent did not in fact receive that contract as Don Cvetan, Sr. testified that he never told the Union that the Agreement would be rescinded if Respondent did not receive the contract in question.

4/ R.J. Smith Construction Co., 191 NLRB No. 135.

what is otherwise an unfair labor practice even though at the time of either the Union has not achieved majority status. See Irving and McKelvy, supra, at 11-12, 82 LRRM 3019." (footnote citation omitted) 5/

Going on, the Court also added that:

> "If the Union, or the employer, can neither bring nor maintain unfair labor practice complaints, pre-hire agreements would be virtually unenforceable. We are certain that this was not the purpose of Congress."

Based upon the Court's holding in Operating Engineers, supra, the undersigned finds no merit in the Employer's allegation that the pre-hire agreement is unenforceable. Accordingly, and since violations of collective bargaining agreements are unfair labor practices under the Wisconsin Peace Act, even though the employer is otherwise subject to the jurisdiction of the National Labor Relations Board, 6/ Respondent's refusal to honor the contract, particularly the union security provisions in Article 3, Section 3.1, constitutes an unfair labor practice within the meaning of Section 111.60(1)(f) of the Wisconsin Statutes. 7/

In so finding, the undersigned is mindful of Respondent's additional defense which it offered during its closing argument, at the end of the second day of hearing, when it asserted that the issues herein should be deferred to the contractual arbitration procedure. This was the first time Respondent raised this defense, even though it had earlier submitted a written answer and an opening statement at the outset of the hearing, neither of which referred to this point.

Based upon the particular facts herein, the undersigned finds that deferral to the arbitral process is unwarranted. Thus, the record clearly establishes that Respondent has not followed the union security provisions of Article 3, Section 3.1, of the agreement. That being so, it would appear that there is no need to now resolve such an undisputed issue in another forum, after the parties have fully litigated the matter here. Secondly, inasmuch as Respondent alleges that it does not even have a valid contract with the Union, and as an arbitrator derives his authority from the contract itself, there may be a serious question as to whether an arbitrator can in fact assert jurisdiction over such a case. Additionally, and most important, deferral is not proper in light

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5/ In that footnote, the Court noted that the Circuit Court of Appeals for the Third Circuit had stated in NLRB v. Irving and McKelvy, supra, 3019:

> [N]othing in either the text of the legislative history of [section] 8(f) suggests that it also intended to leave construction industry employers free to repudiate contracts at will.

6/ C & L Erectors (9718) 6/70.

7/ Inasmuch as the situation herein does not involve a successorship problem, the decision herein is not inconsistent with the Commission's ruling in Overhead Door Company of Wausau, Inc. (9055-B) 9/70, wherein the Commission considered the validity of a pre-hire agreement on a successor employer.

of the fact that the Respondent has in effect waived this defense by belatedly raising this issue at the very conclusion of the hearing, after all the evidence has been adduced. Deferral in such circumstances would in effect mean that a party can fully litigate an unfair labor practice matter and then, after it has had an opportunity to examine a complainant's case for the purpose of determining whether the facts establish an unfair labor practice violation, and, after all the evidence has been adduced, move to have the case relitigated in another forum. Since deferral is in part grounded on the theory that parties should not litigate the same issues twice before two different forums, Respondent's position herein, if accepted, would be directly counter to this policy. Further, as deferral is also partly grounded on the view that parties should resolve their differences via the contractual grievance procedure which they themselves have negotiated, and since Respondent here willingly chose to go the complaint route by insisting that it did not even have a valid agreement with the Union under which this matter could be resolved, there is no valid reason as to why such belated deferral is now warranted. Although not binding on the Commission, it is also noteworthy in considering this issue that the National Labor Relations Board has also found in similar situations that such belated defenses are no bar to deciding the merits of a complaint case, after they have been fully litigated in a complaint proceeding. Thus in Hunter Saw Division of Asko, Inc. 202 NLRB No. 2,N.2., Chairman Edward Miller stated in his concurring opinion, "a respondent seeking to assert this [deferral] defense has the burden of establishing it by pleading and proving facts sufficient to show the applicability of the principles established in the Collyer line of cases." To the same effect was the National Labor Relations Board's decision in Mac Donald Engineering Co. 202 NLRB No. 113, wherein the Board refused deferral because the Collyer 8/ defense was first raised by the respondent before the Board and where the issue was not litigated at the hearing.

Accordingly, based upon the peculiar facts herein and the aforementioned considerations, the undersigned finds that Respondent has waived deferral as a defense and that the issues herein should be decided on their merits. 9/

Since then, as noted above, the facts establish that Respondent executed a valid collective bargaining agreement and that Respondent has refused to abide by Article 3, Section 3.1 of that Agreement, the undersigned finds that Respondent's refusal to honor the terms of the Agreement constitutes an unfair labor practice within the meaning of Section 111.60(1)(f) of the Wisconsin Peace Act.

Dated at Madison, Wisconsin, this 12th day of March, 1974.

WISCONSIN EMPLOYMENT RELATIONS COMMISSION

By _____
Amedeo Greco, Examiner

8/ Collyer Insulated Wire, 192 NLRB No. 150.

9/ In finding that deferral is inappropriate, the undersigned is cognizant of the Commission's general policy to defer alleged contract breaches to the contractual grievance-arbitration procedure. See for example J.I. Case Co. (9729-A, B) 7/70. Here, however, because Respondent claimed that it did not even have a valid contract, and as Respondent did not raise its deferral defense until the very end of the hearing, after all the evidence had been adduced, the undersigned finds, for the reasons noted, supra, that deferral is inappropriate.